IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

vs.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUND

The purpose of a review of this case upon certiorari is to determine whether or not the Negro petitioners, at their trial in the State Court upon a charge of murder which resulted in their conviction and imposition of the death penalty, were accorded their full legal rights guaranteed to them by the Constitution of the United States. The petitioners are now State prisoners awaiting execution, who, after exhausting their remedies in the State Courts, sought release upon habeas corpus in the District

Court of the United States. That Court, after hearing, denied such relief, and its decision was affirmed by the Circuit Court of Appeals. The petition for certiorari to review the case is addressed to this Court under the authority of the United States Statutes which permit such review of a habeas corpus case.

28 USCA, secs. 347 and 462(c).

QUESTIONS IN CONTROVERSY

The specific questions to be determined upon review are:

1. Was there such racial discrimination in the selection and composition of the Grand and Petit Juries which indicted and tried the petitioners in the State Court as would amount to a denial to them of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Did the petitioners, under the facts and circumstances of their case, waive their Constitutional rights?

FACTS OF THE CASE

The petitioners, three Negroes, were jointly indicted by a Grand Jury of the State of Maryland for Baltimore City, composed of twenty-two white men and one Negro, on September 24, 1941, on a charge of murder, and were thereafter jointly tried by a Judge and Jury in the Criminal Court of Baltimore City. A verdict of guilty was found on October 29, 1941. A motion for a new trial was overruled by the Supreme Bench of Baltimore City, acting under the authority of the Maryland Constitution (Art. IV, Sec. 33) to hear and determine mo-

tions for new trial arising upon certain questions. The trial Court thereupon, on December 18, 1941, imposed the death sentence upon each of the accused. The case was then appealed by each defendant to the Court of Appeals of Maryland, the State's highest appellate tribunal, and the decision of that Court (Jackson v. Brady, 26 Atl. (2) 815) affirmed the judgments of the State trial Court.

The Maryland Court of Appeals, however, having no evidence before it in the record on appeal relating to the question raised by counsel as to racial discrimination in the jury selections, could not determine that point, although it had been urged by counsel before the appellate Court. This is made clear in the Court's opinion, where it is stated that the record contained no evidence to show intentional exclusion of Negroes from the Grand Jury or from the list of Petit Jurors from which the special trial panel was chosen. The fact is that the record contained no evidence whatever upon that point, since inquiry upon the question was not pursued after the trial Court overruled the challenge of counsel to the jury array with the discouraging remark that the point was "sour".

Jackson v. Brady, 26 Atl. (2) 815.

For the same reason that record was not sufficient to present the issue involved to this Court on certiorari.

Thereafter application was made on behalf of the petitioners to a Maryland State Judge for a writ of habeas corpus to inquire into the constitutionality of the State Court trial, but the writ was refused. No appeal lies from such action of a State Judge.

Betts v. Brady, 316 U. S. 455.

The petitioners had, therefore, exhausted their remedies in the State Courts prior to their application to the Federal Court for relief.

Smith v. O'Grady, 312 U. S. 329;
Mooney v. Holohan, 294 U. S. 103.

The facts relating to the manner and practice of selecting Grand and Petit Jurors for Baltimore City, with particular reference to racial discrimination, were later developed at the hearing of the habeas corpus case instituted in the District Court of the United States for the District of Maryland on behalf of the petitioners, which case is the subject matter of the petition for certiorari now addressed to this Court.

The record, by the testimony of the jury clerk to the Supreme Bench of Baltimore City who had served 17 years in that capacity (R. 45-56; 65-78), and the further testimony of the Chief Judge (R. 28-42) and an Associate Judge (R. 14-23) of the Supreme Bench of Baltimore City, and from other evidence offered, briefly summarized, shows the following pertinent facts:

That, by the 1940 U. S. Census, the Negro population of Baltimore City is shown to be 19.3% of the total population (R. 40).

That during the years 1933 through 1941 a total of 16,695 white men and 280 colored men served on the Petit Juries of Baltimore City, and that during the same period of time a total of 594 white men and 27 colored men served on the Grand Juries for Baltimore City, that is, 1 Negro on each Grand Jury of 23 members, there being 3 Grand Juries each year (R. 39).

That the service files of jurors for Baltimore City kept by the jury clerk show a total of 18,901 white jurors and 653 colored jurors qualified for service as of October 9, 1942, which numbers were substantially the same as of the term of Court at which the petitioners were tried (R. 40).

That in the year 1941 a total of 4,950 men were summoned by the Sheriff for regular jury service in Baltimore City Courts, of which only 54 were colored. In addition thereto 100 men were summoned as a special panel of which none was colored (R. 58).

It will thus be seen that the 280 Negroes who served on Petit Juries in Baltimore City during years 1933 through 1941 constituted 1.6+% of the total number of 16,975 jurors, both white and colored, who thus served during that period of time; and that the 653 Negroes on the active service list of jurors for Baltimore City at the time of trial were 3.3+% of the total of 19,554, both white and Negroes, on that list.

It is a concessum in the case that each Grand Jury for Baltimore City, the members of which are selected under authority of the local statutory law by the Judges of the Supreme Bench of Baltimore City, for many years, has been composed of 1 Negro and 22 white men.

This great disparity between the number of white persons and Negroes who have been called to serve on the Grand and Petit Juries of Baltimore City throughout the years, it is contended, is due to systematic and arbitrary discrimination against Negroes, which follows from the practices and methods employed by Court officials in selecting jurors for Baltimore City, and is not

the result of any racial discriminatory law relating to jury selections.

For Law Relating to Jury Selections in Baltimore City, see
Public Local Statute (R. 21-32);
Supreme Bench Rule No. 6 (R. 33-37).

The practice followed in selecting Petit Juries for Baltimore City, as shown by the record, at the time of the trial in question and for many years prior thereto, consisted in having the jury clerk send out notices to male persons generally, including some colored persons, whose names are taken promiscuously by him from the city and telephone directories and from other sources, requesting them to appear for jury service.

The jury clerk alone determines in the first instance who shall be so notified. Those persons chosen by him are then notified to appear before a member of the Supreme Bench of Baltimore City acting at the time as Jury Judge.

See Form of Notice (R. 41-42).

Approximately 2,000 persons are so notified each year to appear for examination before the Jury Judge, at which time they are required to fill out a questionnaire.

See Form of Questionnaire (R. 42-44).

After a preliminary examination these persons are either qualified or rejected by the Jury Judge. The names of those qualified are then placed in the service files to be called according to the month of the year most convenient to the jurors to serve. The names of the white and colored persons are typed on differently colored service file cards to distinguish them. Approxi-

mately 20,000 such eligibles are kept in the service files which are replenished once or twice a year to retain that number.

When drawings are made, 750 names are taken from the service files, and typewritten on small ballots which are placed in the jury wheel, the letter "c" being typed after each Negro's name on the ballot. According to his practice, the jury clerk always arbitrarily and without instructions from anyone limits the number of colored persons whose names are placed in the jury wheel to 25 out of a total of 750 names, with a slight variation of one or two more names of colored men in some instances, but his aim is to have 25 names of Negroes out of a total of 750 names in the jury wheel at each drawing (R. 52-56). When drawings are made the ballots are withdrawn from the jury wheel by lot in the presence of the Jury Judge and from those so drawn and later summoned the jury panels of 25 each are made up and sent to the several Common Law and Criminal Courts for service.

The method just described accounts for the very few colored persons who have been called for jury service in Baltimore City during the past years.

At the trial of the petitioners, in the selection of a special jury panel and while the jurors were being examined on their voir dire, counsel for the accused, after there had been submitted some 52 jurors from several panels of which number only 2 were Negroes, made objection by challenging the array of jurors on the ground that the jury was not being selected in accordance with the State and Federal Constitutions. The Court overruled this objection, remarking to counsel: "Your point is sour." Exception to this ruling was taken (R. 37-39).

After this, additional jurors, all white, were submitted, and the panel of 12 was finally selected on which were no members of the accuseds' race, the 2 colored jurors submitted having been peremptorily challenged and struck by the State as allowed by the Maryland Statutory Law.

Md. Code P. G. L. (1939), Art. 51, Sec. 19.

ARGUMENT.

I.

THERE WAS SUCH RACIAL DISCRIMINATION IN THE SELECTION AND COMPOSITION OF THE GRAND JURY WHICH INDICTED, AND OF THE JURY LISTS FROM WHICH THE SPECIAL JURY PANEL WHICH TRIED THE PETITIONERS WAS CHOSEN, AS AMOUNTED TO A DENIAL TO THEM OF THE EQUAL PROTECTION OF THE LAWS.

We most urgently contend that, under the system followed by Court officials as shown by the record in this case, there is such racial discrimination in the selection and composition of the Grand and Petit Juries for Baltimore City as has been denounced by this Court.

Strauder v. West Va., 100 U. S. 303 (1880);
Neal v. Delaware, 103 U. S. 370 (1881);
Norris v. Alabama, 294 U. S. 587 (1935);
Hale v. Kentucky, 303 U. S. 613 (1938);
Pierre v. Louisiana, 306 U. S. 354 (1939);
Smith v. Texas, 311 U. S. 128 (1940);
Hill v. Texas, 316 U. S. 400 (1942).

See also:

Lee v. Md., 163 Md. 56 (1932).

While the early cases in which this Court condemned racial discrimination in jury selection involved total exclusion of Negroes from the jury lists, in the late case of

Smith v. Texas, supra, this Court held void the conviction of a Negro who had been indicted by a Grand Jury of a Texas County where Negroes constituted 20% of the total population, and where the Court records showed that during a period of seven years only 5 of the 384 Grand Jurors who had served during that time were Negroes, and that of 512 summoned to serve only 18 were Negroes, and that, because of devious methods of selection by Court officials, of 32 Grand Jurors empanelled only 5 had Negro members while 27 had none.

It is seen, therefore, that there may be unlawful racial discrimination in the selection of jury lists without total exclusion of Negroes.

Commenting upon the case of *Smith v. Texas, supra,* a Committee on Selection of Jurors, composed of District Judges of the United States, in its report on September 8, 1942, to the Conference of the Chief Justice with the Senior Circuit Judges of the United States, gives a salutary warning to the Courts in the following language:

> "Since the 'Scottsboro' cases, it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violation of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 311 U. S. 128 (1940)."
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> Report, pp. 18-22.

We respectfully contend that the instant case comes clearly within the principle established in *Smith v. Texas, supra,* and that any method, whereby the members of any particular race or group are arbitrarily lim-

ited in number for jury service, is discriminatory in character, and should be condemned by this Court.

If it was unconstitutional to limit the number of Negro Grand Jurors in *Smith v. Texas, supra,* as decided by this Court, then it is likewise an unlawful discrimination against the Negro in Baltimore City to permit only one of his race to serve on each Grand Jury of 23 members and to limit the Negro representation upon the Petit Jury lists from which the panels of jurors are chosen to 25 in each 750 names selected. This is particularly true since the Negro population of Baltimore City is 19.3% of the total and when it is a well-known fact that a high percentage of those Negroes are sufficiently intelligent and educated to be competent jurors.

We submit that the paucity in number of Negroes who have been called for service upon the Petit Juries of Baltimore City was explained by the jury clerk when he testified that it was his practice to place the names of only 25 Negroes in the list of 750 names which went into the wheel from which the jurors were drawn. The confirmation of his testimony is in the figures showing how many whites and how many Negroes were, in fact, drawn from the wheel.

It is important, in considering the testimony of the two Judges of the Supreme Bench of Baltimore City, as shown by the record, to keep in mind that it would make no difference at all whether the number of Negroes who were qualified by the Jury Judge as fit and available for jury service was large or small. No matter how many Negroes were on the qualified list, 25 and only 25 would be used.

So long as there were available qualified Negroes in excess of 25 (the stipulation shows at all times 653 qualified Negro jurors, R. 40), it must follow that in making up the 750 list that the Negro as such was discriminated against by the application of the jury clerk's rule of 25 Negroes for every 750 possible jurors.

It is submitted that the figures appearing in the stipulation of persons qualified for jury service, to wit: Whites, 18,901, Negroes, 653 (R. 40), do not indicate that only 653 Negroes could be found in the total number of qualified jurors of 19,554. Under the jury clerk's rule of 25 Negroes for every 750 jurors, a ratio of 1 in every 30, there would be no need to build up a service file of Negroes in any greater proportion than 1 Negro in every 30 jurors to be qualified. This is the true reason for the relatively few Negroes on the qualified jurors' list. It can hardly be argued that in the male Negro population over 25 years of age in Baltimore City, only 653 persons can be found to qualify.

The ratio in the service files is slightly greater than 1 in 30. It will be noted that the proportion resulting from the application of the jury clerk's rule in the case of Petit Juries is not greatly at variance with the proportions established over the years by the Supreme Bench of Baltimore City itself, in drawing Grand Juries—1 Negro Grand Juror for every 23 Grand Jurors; always 1, never more, never less.

The testimony of the Supreme Bench Judges, therefore, respecting the relatively greater difficulty of obtaining Negroes than whites for jury service is, in the circumstances of this case, quite immaterial. If the Negroes who qualified and were available equalled in num-

bers the whites there would still go in the 750 list the same number of 25.

Another fact to be kept in mind, in considering the Judges' testimony, is, that the number of Negroes on each Grand Jury remains 1 throughout the years; and on the Petit Juries the ratio of Negroes to whites has remained substantially constant for the past 9 years. The ratio does not vary with the ups and downs in employment, nor with the increase in population; what it was before the inauguration of the Public Relief System, it remained during the years that the system was flourishing. It remains the same in peace times as in war times.

It is a matter of common knowledge that in the past 20 years the Negro has made great strides, economically and educationally, yet the jury clerk's rule of 25 out of 750 has not changed during his 17 years in office, and the rule was in effect for some years prior thereto (R. 55).

Another comment on the suggestion that it is relatively more difficult to obtain Negro than white jurors is, that the difficulty, if it exists, may in part be accounted for by the reluctance or diffidence of the ordinary Negro to serve where he knows he will be one among 22 others of the Grand Jury, all of whom will be of the white race; and, in the case of the Petit Jury panels, that he will ordinarily be just one (occasionally he will have a fellow Negro), among 24 whites.

It is clear, therefore, that the selection of jurors for Baltimore City, under the methods described in the testimony is—

(1) Arbitrary, in that:

(a) It is left to the judgment and sole discretion of one man, the jury clerk, to determine in the first instance, what persons shall be notified to appear for jury service;

(b) The jury clerk alone decides that the names of 25 Negroes only of a total of 750 names shall be placed in the wheel each time there is a drawing for jury service; and

(c) The selection of one Negro for each Grand Jury is the result of a decision and practice without reason.

(2) Systematic, in that:

It has been practiced for many years according to a system which has been designed and followed by the jury clerk alone, as to Petit Jurors (apparently without the actual knowledge of members of the Supreme Bench), without variation, without regard to increase in population, without consideration for changes in the economic conditions of the City or its people, or the ups and downs in employment.

It makes no difference whether the scheme is unintentional or otherwise, ingenuous or ingenious, its result is the same—discrimination against the Negro because of his race. The system cannot be defended, and it is respectfully submitted that it should receive the condemnation of this Court.

Smith v. Texas, 311 U. S. 128, 132.

This Court has held that it is not at liberty to grant or withhold the benefits of equal protection of the laws, which the Constitution commands for all, merely as it may deem the defendant innocent or guilty.

Hill v. Texas, 316 U. S. 400, 406,

Citing:

Tumey v. Ohio, 273 U. S. 510, 535.

The question in the instant case is an important one, and should be determined by this Court after a full review of the facts and the applicable law and judicial decisions. This is especially true at this time when the proper method of jury selections has been made the subject of special study by a Committee of United States District Judges, and when it is to be presumed that appropriate legislation and Rules of Court will be enacted and adopted upon the subject. The guidance of this Court by the enunciation of general principles upon the question at issue is needed at this time.

In a community containing a large Negro or other minority racial group, what number of qualified representatives of that race would be considered suitable and adequate representation on the jury lists? Certainly, there can be no exclusion of such a minority group as this Court has definitely decided. And, in *Smith v. Texas, supra,* a small number of Negroes on the Grand Juries from time to time made the indictment of a Negro under such circumstances void. This Court will have an opportunity by a review of the present case to lay down the general principles of law which will greatly aid in determining what would be fair and adequate racial representation in a case presenting facts such as the one for which a review is here sought.

We respectfully submit that 1 Negro on a Grand Jury of 23 members and 25 Negroes in each 750 jurors from which the Petit Jurors are drawn is not a fair and adequate representation of the Negro minority racial group which constitutes 19.3% of the total population of Baltimore City. The Negroes indicted and tried by Grand and Petit Juries constituted as shown by the facts in the instant case did not receive at their trial the equal protection of the laws to which they were entitled under the Fourteenth Amendment to the Constitution of the United States.

II.

THERE WAS NO WAIVER OF THE CONSTITUTIONAL RIGHTS OF THE PETITIONERS, UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE, AT THEIR TRIAL IN THE STATE COURT.

There would appear to be no doubt that, under the decisions of this Court, there is racial discrimination against Negroes according to the practice followed by Court officials in the selection of the Grand and Petit jurors for service in the Baltimore City Courts. We contend that the indictment and trial of a Negro by jury panels so selected and composed is void.

The point made by the State is, that the petitioners did not interpose any objection to the constitution of the Grand Jury prior to their trial and conviction, and that they inadequately presented their objections to the methods employed in the selection of the lists from which the Petit jurors were drawn.

We do not contend that the indictment of a Negro by a Grand Jury composed of 1 Negro member is necessarily void because of racial discrimination. But when every Grand Jury over a period of many years is lim-

ited to 1 Negro out of 23 members that does constitute racial discrimination such as has been condemned by this Court, and the indictment of a Negro in such a case is void.

While it is true that counsel for the petitioners did not specifically object to the constitution of the Grand Jury in the present case prior thereto, they did make the point of race discrimination at the opening of the trial by challenging the whole array of jurors. This, we contend, was sufficient to include the Grand Jury which indicted the petitioners. We would call the Court's attention to the fact that the statutory law regulating the selection of Grand and Petit Jurors for the Courts of Baltimore City (Secs. 687 and 689, R. 21-22) directs that the 23 Grand Jurors be selected by the Judges of the Supreme Bench of Baltimore City from a qualified list of 750 jurors. Hence, by statutory requirement, the Grand and Petit Jurors are taken from the same qualified lists. If these lists are illegally selected, as we have herein pointed out, by reason of racial discrimination, then the Grand Juries as well as the Petit Juries are subject to the same defect. Therefore, the challenge to the whole array of jurors made at the opening of the trial would go to the Grand Jury as well as to the lists from which the Petit jurors are chosen. We make the point, then, that the challenge at the beginning of the trial had the effect of reaching both the Grand and Petit Juries.

As to the adequacy of presentation of the point of objection we again direct the Court's attention to the fact that 3 Negroes were being tried; that it was a certainty that under the system followed the jury would consist of all white men, the State having the right of peremptory challenge to the extent of 30 jurors in the joint trial of 3

men (Md. Code, P. G. L., 1939, Art. 51, Sec. 19), and in fact the State did strike the two Negro jurors presented; that at the opening of the trial under these circumstances there was great probability of raising a race issue which would react to the prejudice of the men on trial; that the trial Judge was the Chief Judge of the Supreme Bench of Baltimore City and as such had, or should have had, full information as to the manner and method of selecting jurors, both Grand and Petit, for service in the Baltimore City Courts; that the Judge certainly discouraged any inquiry upon the point, as we have herein pointed out; that in such a case the defendants on trial should not be bound to pursue inquiry upon a point which the Court indicated at the outset would be overruled, and the effect of which inquiry would undoubtedly be ineffectual with the Court and adverse to the defendants. Under these circumstances, we submit, that the petitioners sufficiently made the point of racial discrimination to put the Court on notice and if necessary to stop the trial until a legally constituted jury could be obtained, and if the State Courts, both trial and appellate, did not follow such procedure, and did not decide the question because of a lack of sufficient evidence in the record, then it is incumbent upon the Federal Court on habeas corpus to pursue the inquiry to determine whether or not the petitioners were accorded their full constitutional rights at the trial which resulted in their conviction and the imposition of the death penalty.

It is apparent that the State Courts did not properly safeguard the petitioners' constitutional rights, the State appellate Court avowedly refraining from a decision of the point upon the ground that the record before it did not sufficiently disclose the facts relating to the jury selections, and that prejudice would not be inferred.

In this situation the petitioners are now entirely dependent upon this Court to review their whole case fully in order to determine whether or not their constitutional rights were protected at their trial in the State Court.

Frank v. Mangum, 237 U. S. 309 (1915);
Moore v. Dempsey, 261 U. S. 86 (1923);
Mooney v. Holohan, 294 U. S. 103 (1935).

An analysis of the cases cited by the distinguished Judges who wrote the opinions of the District Court and the Circuit Court of Appeals, respectively, to substantiate the fact of waiver by the petitioners of their constitutional rights, will show that in each instance such waiver was definite, intentional and deliberate, or that there was a complete failure to make the point before the trial Court. The instant case presents a different state of facts, as we have herein pointed out.

CONCLUSION.

Having fully demonstrated that there was such racial discrimination as made void the indictment and trial of the petitioners in the State Court, we contend that, under all the facts and circumstances of the case, there was no waiver of the right of the petitioners to the equal protection of the laws at their trial, and we, therefore, respectfully submit to this Honorable Court their petition for certiorari to review their case fully in order that their constitutional rights may be properly safeguarded.

Respectfully submitted,

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